

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original Affidavit of Mailing

77-1068

To be argued by
LAWRENCE J. ZWEIFACH

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1068

UNITED STATES OF AMERICA,

Appellee,

—against—

BARBARA MEYERS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
LAWRENCE J. ZWEIFACH,
Assistant United States Attorney
(Of Counsel).

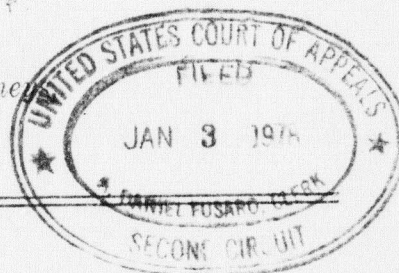


TABLE OF CONTENTS

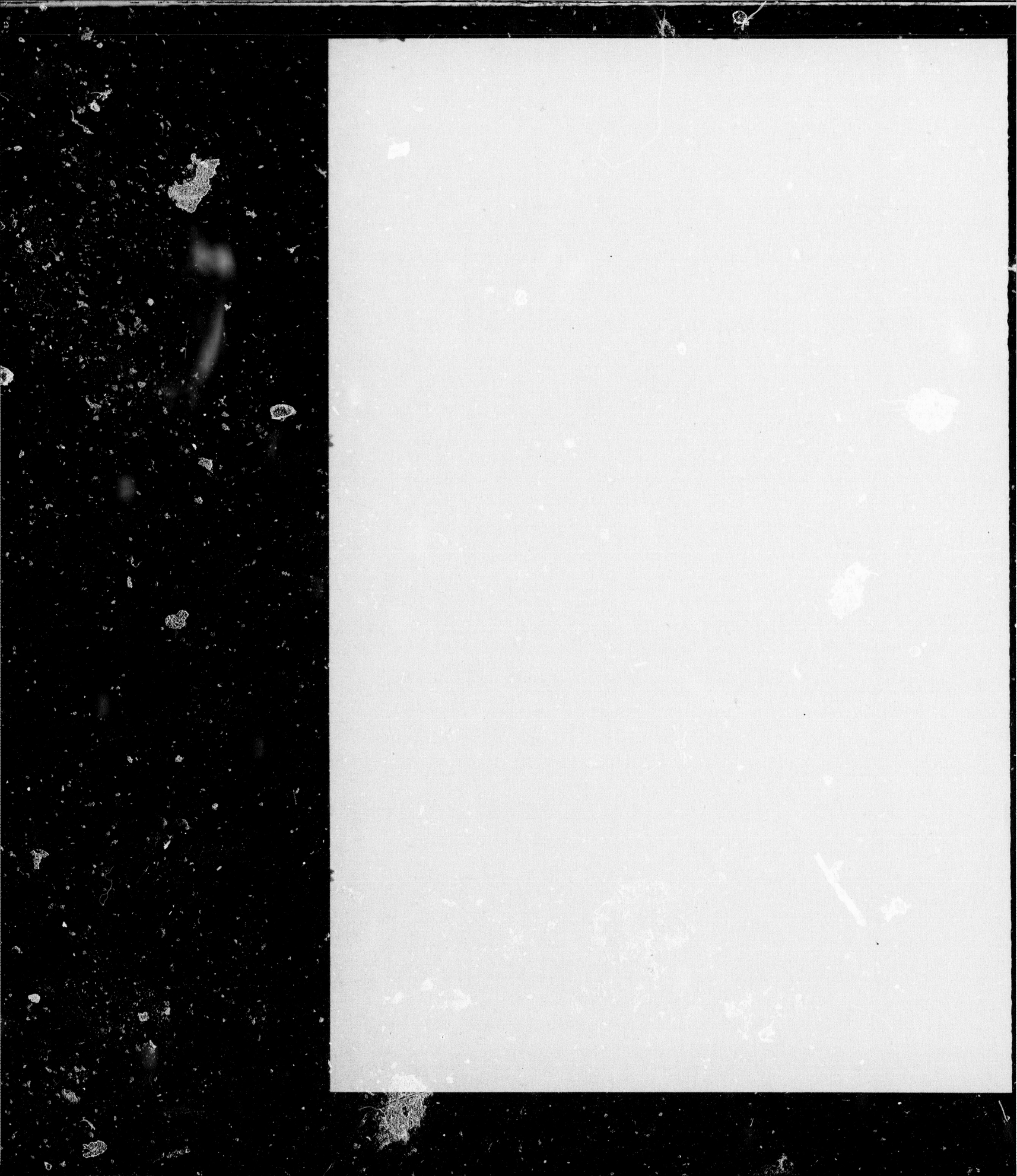
	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
B. The Defense Case	6
ARGUMENT:	
POINT I—Assuming that the District Court's charge did, in fact, include extraneous information relating to some other criminal prosecution, the error was harmless	7
POINT II—The District Court's charge was fair and proper	10
A. The jury was properly instructed regarding the elements of the offense charged by the Indictment	10
B. The jury was properly instructed regarding the credibility of the testimony of appellant and Chiarello	13
C. The Court did not commit error by failing to instruct the jury regarding appellant's prior conviction	13
D. The Court did not commit plain error in its charge regarding the voluntariness of appellant's statement	15
E. The prosecuting attorney did not commit plain error in his summation	17

	PAGE
POINT III—Appellant was properly sentenced under Title 18, United States Code, Section 3651	18
CONCLUSION	24

TABLE OF CASES

<i>Anderson v. United States</i> , 369 F.2d 11, 17 (8th Cir. 1966), <i>cert. denied</i> , 386 U.S. 976 (1967)	15
<i>Driver v. United States</i> , 232 F.2d 418 (4th Cir. 1956)	21
<i>Fagan v. United States</i> , 545 F.2d 1005 (5th Cir. 1977)	23
<i>Holtzman v. Schlesinger</i> , 484 F.2d 1307 (2d Cir. 1973), <i>cert. denied</i> , 416 U.S. 936 (1974)	22
<i>Meyer v. United States</i> , 175 F.2d 45 (2d Cir. 1949)	20
<i>Mitchem v. United States</i> , 193 F.2d 55 (5th Cir. 1951)	21
<i>United States v. Barry</i> , 518 F.2d 342 (2d Cir. 1975)	15
<i>United States v. Floyd</i> , 555 F.2d 45 (2d Cir. 1977)	13
<i>United States v. Grunberger</i> , 431 F.2d 1062 (2d Cir. 1970)	17, 18
<i>United States v. Hysohion</i> , 439 F.2d 274 (2d Cir. 1971)	18
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (en banc), <i>cert. denied</i> , 383 U.S. 907 (1966)	9
<i>United States v. Lucchetti</i> , 533 F.2d 28 (2d Cir.), <i>cert. denied</i> , 429 U.S. 849 (1976)	15
<i>United States v. Mahler</i> , 363 F.2d 673 (2d Cir. 1966)	13
<i>United States v. Nathan</i> , 476 F.2d 456, 460 (2d Cir.), <i>cert. denied</i> , 414 U.S. 823 (1973)	15

	PAGE
<i>United States v. Projansky</i> , 465 F.2d 123 (2d Cir.), cert. denied, 409 U.S. 1006 (1972)	9
<i>United States v. Sanjurjo</i> , 481 F.2d 638 (2d Cir. 1973)	22
<i>United States v. Silvas</i> , 483 F.2d 1392 (5th Cir. 1973), cert. denied, 415 U.S. 924 (1974)	15
<i>United States v. Teresi</i> , 484 F.2d 894 (7th Cir. 1973)	23
<i>United States v. Wertheimer</i> , 434 F.2d 1004 (2d Cir. 1970)	22



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1068

UNITED STATES OF AMERICA,

Appellee,

—against—

BARBARA MEYERS,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Barbara Meyers appeals from a judgment of the United States District Court for the Eastern District of New York (Pratt, J.) entered on January 28, 1977, convicting her, after a jury trial, of knowingly possessing a United States Treasury Check which had been stolen from the mail, in violation of Title 18, United States Code, Section 1708. Appellant was sentenced to a term of three years imprisonment to be served as a split sentence pursuant to Title 18, United States Code, Section 3651: three months in a jail type institution, the remainder of the sentence suspended, and a probation term of four years to commence upon the release of appellant from confinement. Execution of the sentence for appellant was stayed pending appeal.

On this appeal appellant does not contest the sufficiency of the evidence. Appellant does, however, raise

three issues: (1) that the inclusion in the court's charge of extraneous material pertaining to some other criminal prosecution prejudiced appellant by implying her involvement in additional criminal proceedings not disclosed to the jury; (2) that by virtue of the prosecutor's comments and certain deficiencies in the court's charge, appellant did not receive a fair trial because the jury was misapprised regarding (i) the requirement of knowledge, (ii) the assessment of appellant's truthfulness, (iii) the limited use of other crime evidence, and (iv) the standard of voluntariness applicable to appellant's statement; and (3) that appellant's probation sentence was illegal because the maximum probation period imposable under 18 U.S.C. § 3651 may not exceed the length of that portion of the original sentence which has been suspended by the court.

Statement of Facts

A. The Government's Case

Donna Chiarello, the sister-in-law of appellant, was the Government's chief witness.¹ Through the testimony of Chiarello and other witnesses, the prosecution presented overwhelming evidence of appellant's guilt.

The evidence showed that on December 2, 1975, Chiarello and appellant agreed to meet the following day for the purpose of stealing a check (31).² On the morning of December 3, 1975, Chiarello met appellant at the latter's house where appellant advised her "on the third of the month Social Security checks were out" (32). Thereafter,

¹ Prior to trial, Chiarello pleaded guilty before Judge Pratt to stealing a United States Treasury check payable to "Jacob Flusberg" from the United States mail.

² Unless otherwise noted, all references are to the trial transcript.

appellant drove Chiarello in the former's car to a building located at 8682 17th Avenue, Brooklyn. Chiarello entered the building, opened a mailbox with a screwdriver, and removed an envelope containing a United States Treasury check payable to "Giosebdina Scala". This check was placed in the mail on November 29, 1975 (27, 28). Chiarello then entered the car and, in the presence of appellant, wrote the name "Giosebdina Scala" on the back of the check (32, 33). Chiarello and appellant proceeded to drive to the Friendly Corner Deli where appellant entered the store alone with the Scala check (34, 111). The store owner, Frank Indelicato, accepted the Scala check after appellant told him that Giosebdina Scala was her aunt (110). Appellant afterward gave Chiarello a sum of money for signing the check (34, 35).

Chiarello and appellant participated in a number of schemes similar to that employed in connection with the Scala check. On November 13, 1975, Chiarello entered appellant's mother's building at 1492 Shore Parkway, Brooklyn, and appropriated an envelope containing a State of New York check payable to "A. Walowitz" (35, 36, 55). Chiarello signed the name "A. Walowitz" on the back of the check and agreed with appellant that Chiarello would receive half the proceeds obtained by appellant upon the cashing of the check (41, 42). Chiarello accompanied appellant to a Key Food store and waited outside the store when appellant cashed the Walowitz check (57, 58). Pursuant to their agreement appellant paid Chiarello seventy dollars from the proceeds (42, 88).

On January 3, 1976, Chiarello stole a United States Treasury check, payable to "Jacob Flusberg", from a mailbox in a building located at 8785 Bay 16th Street, Brooklyn; again, appellant waited outside the building in a car (46). After signing the name "Jacob Flusberg" on the back of the check, Chiarello drove with appellant to the Friendly Corner Deli (44, 46-48). Similarly, appellant

entered the store alone (113, 114) and told the owner, Indelicato, that Jacob Flusberg was another of her relatives; Indelicato accepted the Flusberg check based upon appellant's representations (112). Thereafter, appellant gave Chiarello forty-six dollars from the proceeds (87).

In early January 1976 (91, 92), Chiarello stole another United States Treasury check, payable to "Frances A. Hoffman",³ from a building located at 8682 17th Avenue, Brooklyn (the building from which the Scala check was stolen); likewise, appellant waited for Chiarello in a car during this theft (49). After Chiarello signed the name "Frances A. Hoffman" on the back of this check, appellant entered the Friendly Corner Deli alone, and presented the check for payment to Indelicato (112-114).

Chiarello stole two or three other unspecified checks during December 1975 and January 1976, which she gave to appellant to cash (50). In addition, during this period, appellant broke open a mailbox in a building using a screwdriver; however, no checks were obtained (48, 88).

On March 10, 1976, appellant was interviewed at her home by United States Postal Inspectors Robert Klaus, Jr. and Henry Delicia (126, 127). Appellant signed a waiver of rights form after having been advised of her *Miranda* rights (127-129). Appellant admitted that she cashed the Scala and Flusberg checks at the Friendly Corner Deli after receiving these checks from her sister-in-law Chiarello (129, 130). She further stated that she cashed the Scala check "knowing it to be stolen" (145). This interview was adjourned to March 11th so that appellant could make arrangements to have someone care for her children (151, 172).

³ The transcript sometimes erroneously refers to the payee as "Francis Loftman" (49).

On March 11, 1976, appellant was interviewed again by Inspectors Klaus and Delicia at the Brooklyn General Post Office (130). Appellant was advised of her *Miranda* rights and signed a waiver of rights form (130-132); at no time did appellant request an attorney (157). Appellant again admitted cashing the Scala and Flusberg checks at the Friendly Corner Deli (133). In addition, appellant swore to a statement which she wrote in the presence of Inspectors Klaus and Delicia.⁴ Inspector Klaus did not attempt to correct the diction employed by appellant in her written statement (139).

⁴ Appellant's written statement, dated March 11, 1976, reads in part as follows:

On or about 1/24/74 I got a Blue Shield Check # 3849886 dated 10/18/73 in the amount of \$115 payable to Vincent Buonomo, 211 Bay 11th Street, Brooklyn, New York. From a guy who I thought was Vincent Buonomo, the check had not been signed so when I cashed the check at Bonvis Enterprises at the corner of New Utrecht Avenue and 76th Street I signed Vincent's name to the check.

On or about 12/3/75 my sister-in-law Donna Chiarello came to my house with United States Treasury Check # 59449875 dated 12/3/75 in the amount of \$164.90 payable to Giosbdina Scala, 6682 17th Avenue in Brooklyn, New York.

She wanted to know if I knew someone who could cash the check. At that time I know the check is stolen, I took her to a store called Friendly Corner on New Utrecht Avenue, Brooklyn, New York where she cashed that check.

I got no money from this check. On several occasions I would meet Donna at which time she would have several checks in her possession, there was about six checks I helped her cash.

I know the checks were stolen from the mail, I helped Donna Chiarello cash checks at Friendly Corners and Bensonhurst Meat Market on 13th Avenue in Brooklyn, New York.

B. The Defense Case

Appellant testified in her own behalf and was the only defense witness. Appellant admitted that she cashed the Flusberg and Hoffman checks at the Friendly Corner Deli, knowing at that time that those checks were stolen (202, 203, 221); her explanation for this was that Chiarello "needed the money" (203). However, appellant did not receive any money for cashing these checks (222). Chiarello was present at the Friendly Corner Deli when appellant cashed the Flusberg and Hoffman checks (202, 203, 222). At the time that appellant cashed the Flusberg check, she told Indelicato that the check belonged to the father of an individual standing next to her and Chiarello in the store (224).

Despite the aforementioned admissions, appellant denied cashing any checks for Chiarello before December 3, 1975, and specifically denied receiving the Walowitz check from Chiarello (196, 197). With regard to the Scala check, appellant first learned that it was stolen when so informed by Indelicato a month or two after December 3, 1975 (201, 202).

Chiarello led appellant to believe that the Scala check belonged to appellant's aunt, Mary Scala (198, 223). Appellant never looked at the face of the Scala check (217, 220) and Chiarello did not endorse the check in her presence (199). On December 3, 1975, Chiarello drove appellant to the Friendly Corner Deli in a car belonging to a friend of Chiarello (199). Appellant then introduced Chiarello to Indelicato, and told him that Chiarello had her aunt's check. Chiarello received most of the cash from this check and appellant received about twenty dollars which she used to purchase groceries (201).

At the March 11, 1976 interview with Inspector Klaus, appellant requested an attorney but was told by him "if

pellant argues that the disputed instruction might have led the jury to believe that she not only faced conspiracy charges in a related prosecution but also had prior similar crimes which had not been disclosed at the trial proper. We submit that appellant's contention is without merit.

A. At the outset, we submit that the disputed portion of the district court's charge was probably not read to the jury, but rather was included in the transcript because of an inadvertent error by the court reporter.⁶ The circumstances surrounding the reading of the disputed instructions lend strong support to this conclusion. First, the instruction is a lengthy one which refers to, *inter alia*, the testimony of a witness, "DiMitrio", who did not in fact testify at the trial. It is, quite simply, implausible that Judge Pratt would have read an instruction of this length and specificity regarding a nonexistent witness in

to be taken by you as evidence of a crime. But, if you believe this testimony, and if you find the Government has established that the defendant performed those acts, or made those statements, and if you find that they were similar to acts at issue here, then you may use the testimony of those similar acts to help you determine whether the defendant's acts relating to the charge in this indictment were knowingly or willfully performed by the defendant, or were they were innocently performed.

However, the defendant is here only to defend the charge in this indictment which alleges conspiracy between 8/5/74 and 3/10/75 and in addition 9/9/74 and 3/10/75. It would be improper for you to convict her of a crime not charged in this indictment. Therefore, do not concern yourself with any possible criminal consequences of the 1972-73 events or the discussion with Mr. "DiMitrio" after the time of his arrest on 4/11/75.

⁶ At the writing of this brief, there is pending before Judge Pratt a motion by the Government, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure and Rule 36 of the Federal Rules of Criminal Procedure, to correct certain errors in the record of this appeal, including that portion of the district court's charge set forth in Note 5, *supra*.

a trial that only had five witnesses. Second, no objections were raised by either defense counsel or the prosecuting attorney. It is manifestly unworthy of belief that both attorneys would permit this instruction to be read without objection. Finally, the jury did not pose any questions regarding the charge.⁷ Since the jury was sufficiently astute to pose a question regarding a crucial issue in the case, the fact that they did not question the import of the testimony of "Mr. DiMitrio" clearly lends weight to the conclusion that they did not hear the disputed instruction. Since it is clear that the "extraneous material" in the transcript was most probably not read to the jury, appellant's argument must fail.

B. Assuming, *arguendo*, that the district court's charge did include the disputed instruction, the error was harmless. First, appellant concedes that trial counsel did not object to any portion of the district court's charge. It is axiomatic that where there has been a failure to object to a purportedly defective charge, in order to warrant reversal of the conviction, the error must be one which affects "substantial rights" of the appellant and thus be one of plain error. Rules 30, 52(b), Fed. R. Crim. P.; *United States v. Indiviglio*, 352 F.2d 276, 280-81 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966); *United States v. Projansky*, 465 F.2d 123, 135-36 and n.2 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

Second, viewing the charge in its entirety, it is plain that the appellant could not have been prejudiced by a mistaken, elliptical reference to clearly irrelevant facts. To begin with, the court instructed the jury time and again that it was the sole and exclusive judge of the

⁷ It should be noted that during their deliberations the jury did submit a note to the court requesting that all of Inspector Klaus' testimony and part of appellant's testimony be read to them (340-343).

facts and that it was the jury's recollection of the facts that controlled (304, 305, 329). In his charge the judge further admonished the jury that his comments during the charge were not evidence (311), and were not to take the place of the jury's recollection of the evidence (305). Indeed, the jury was told by the court in unequivocal terms that it could consider as evidence only sworn testimony, exhibits received in evidence and facts which may have been admitted or stipulated (310-311). Finally, in considering appellant's claim, the overwhelming evidence of appellant's guilt cannot be disregarded; appellant unequivocally admitted that she cashed the Flusberg and Hoffman checks for Chiarello, knowing at the time that they were stolen. Consequently, we urge that appellant's claim should be rejected.

POINT II

The District Court's charge was fair and proper

Appellant contends that several comments by the prosecuting attorney coupled with certain claimed deficiencies in the district court's charge deprived appellant of a fair trial notwithstanding the absence of any objection to the charge as given. The district court's charge, viewed in its entirety, properly apprised the jury of the essential elements of the crime and in all respects was fair and proper. Under the circumstances, the judgment of conviction should be affirmed.

A. The Jury Was Properly Instructed Regarding The Elements Of The Offense Charged By The Indictment

Appellant first contends that the jury was misapprised regarding the requirement that knowledge is an essential element of the offense set forth in 18 U.S.C. § 1708. Specifically, appellant argues that the prosecuting attorney confused this issue by posing several improper ques-

tions during his redirect examination of Inspector Klaus.⁸ Appellant further claims that the term "aiding and

⁸ The following questions were posed by the prosecuting attorney to Inspector Klaus in redirect examination (169-171):

Q. I ask you sir, you testified you're familiar with the United States Code and training and pursuant to the question asked by Mr. Levitt, you had full knowledge of at least the postal division of the United States Code.

I ask you and direct your attention to the United States Code, Title 18, Section 1708. I ask you to look at that statute, or based upon your independent knowledge, is it not a fact, sir, that knowledge was not an element required in this case?

MR. LEVITT: Your Honor, I am going to object. First to the form of the question, is it not a fact, sir, that and Mr. Teitler is now giving us a legal discourse which I think is inappropriate. I'll object on the ground he is leading and objection on the ground this line of questioning is improper.

THE COURT: I'll sustain the objection as to the form, but even if it were proper in form I think I will sustain the objection of inquiring of this witness as to the laws bearing upon this case. That is for me to instruct the jury about.

MR. TEITLER: I believe so [Judge], but Mr. Levitt asked the witnesses a particular question whether or not knowledge was required for a violation of the law and I am just trying to elicit from the witness the complete accuracy of that statement.

THE COURT: I understand your question to be that I am applying that knowledge was not an element of this offense.

MR. TEITLER: No Judge, that indeed is an element of the offense charged.

THE COURT: You told the jury it was in your opening statement.

MR. TEITLER: Maybe I'll rephrase the question from Mr. Klaus.

Q. Mr. Klaus, Donna Chiarello was charged was she not with stealing a United States Treasury check is that not a fact, sir?

A. Correct.

[Footnote continued on following page]

abetting" should have been defined by the district court because it was brought before the jury in a question raised by the prosecuting attorney (171).

To begin with, any confusion that could have been created in the jury's mind by the improper questions concerning the issue of knowledge was immediately remedied by the colloquy, in the jury's presence, between the court and counsel for the Government that knowledge was indeed an issue and that, as an essential element of the crime charged, it was the province of the court to instruct the jury on that issue (170). Any residual confusion on the jury's part must have been cured by the court's instructions to the jury which included a charge on the issue of knowledge (312-313).

Nor did the district court err in failing to define the term "aiding and abetting" for the jury in its charge. Nowhere was appellant charged with aiding and abetting the offense charged in the indictment, and the Government at no time offered proof to support such a theory of guilt. In light of the court's immediate curative instruction to the jury that the unanswered questions should be disregarded (171), it is difficult to see how the appellant could have been prejudiced. Indeed, to have included such a charge in its instructions, under the circumstances, would have confused the jury unnecessarily. Consequently, while we do not condone improper lines of questioning, the court's immediate curative instructions to the jury

Q. And were you the investigator on that particular case?

A. Correct.

Is it not a fact, sir, that [appellant] Barbara Meyers could have been charged if the United States Government so desired to aiding and abetting theft?

[Objection sustained]

Q. Based upon the facts set forth in Mrs. Meyers' statement, did she not admit to uttering forged instruments?

[Objection sustained.]

coupled with its flawless charge on the elements of the offense (312-313) immediately prior to its submission of the case to the jury dissipated any harmful effects. Appellant's claim to the contrary notwithstanding, the jury plainly was not misled.

B. The Jury Was Properly Instructed Regarding the Credibility of the Testimony of Appellant and Chiarello

Appellant next asserts that the jury was misled in its appraisal of her credibility because though the trial court alluded to appellant's vital interest, it purportedly failed to alert the jury to the interests of other witnesses, particularly the accomplice Chiarello. An identical claim was recently rejected by this Court in *United States v. Floyd*, 555 F.2d 45, 47 n.4 (2d Cir. 1977) where less favorable accomplice and defendant's testimony instructions by Judge Pratt were upheld as adequate. Indeed, in his charge to the jury in the present case, Judge Pratt followed the preferred practice referred to in *Floyd*, *supra* at 47, n.4, of cautioning the jury that the defendant's vital interest is not inconsistent with the ability to testify truthfully (327). It follows that viewed in its entirety the court's accomplice charge and defendant's testimony charge were entirely proper. *See, United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. 1966).

C. The Court Did Not Commit Error By Failing to Instruct the Jury Regarding Appellant's Prior Conviction

Appellant claims that the district court committed plain error by failing to instruct the jury regarding other crime evidence which the defense had adduced on its direct case because of certain remarks in the prosecuting attorney's summation (297-298). Specifically, the prosecutor argued:

I think the government pretty well establishes and the defense established *what type of believability* Mrs. Meyers has in this case. This business of possessing stolen property is not new in the sense that we have shown she has been involved with other checks. *In fact solely as it bears on her credibility* we have shown cross examination, she was convicted on April 5, 1976 of criminal possession of stolen property, as the Court will tell you that will in the proof she is guilty her, *but it will bear on her believability as a witness*, because it bears on her ability to tell the truth and her honesty, or dishonesty. It's a question of do you believe the government's evidence, or do you believe the defendant. (emphasis added).

A plain reading of this statement indicates that although the prosecuting attorney initially juxtaposed the concept of similar act evidence with the fact of appellant's conviction, he carefully qualified his initial statement by explaining that appellant's conviction bears solely on her credibility as a witness.⁹ Again, it must be noted that appellant's trial counsel did not object to these remarks by the prosecutor, nor request a charge regarding the use of prior crime evidence.

⁹ Moreover, in an earlier part of his summation, the prosecuting attorney clearly stated that the fact of appellant's conviction bears solely on her credibility (252):

She admitted on her own case when Mr. Levitt asked her were you ever convicted of a misdemeanor the answer was yes. On cross-examination I asked her what was that conviction for. On April 5, 1976 Mrs. Meyers was convicted of criminal possession of stolen property. Again, *we don't rely on that to establish that she committed the crime here. But, we do use that information to show you that bears on the believability, or credibility or the truth worthiness of the witness on the witness stand* (emphasis added).

In any event, we submit that by introducing evidence of a misdemeanor conviction for possession of stolen property on her direct case, appellant proceeded at her peril and opened the door to the use of the underlying conduct for proper purposes other than impeachment, including use of such conduct as evidence of a similar act pursuant to Rule 404(b) of the Federal Rules of Evidence to negate a claim of mistake or accident. Cf. *United States v. Silvas*, 483 F.2d 1392 (5th Cir. 1973), cert. denied, 415 U.S. 924 (1974); *United States v. Nathan*, 476 F.2d 456, 460 (2d Cir.), cert. denied, 414 U.S. 823 (1973); *Anderson v. United States*, 369 F.2d 11, 17 (8th Cir. 1966), cert. denied, 386 U.S. 976 (1967).

D. The Court Did Not Commit Plain Error In Its Charge Regarding The Voluntariness of Appellant's Statement

Relying on *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975) and *United States v. Lucchetti*, 533 F.2d 28 (2d Cir.), cert. denied, 429 U.S. 849 (1976), appellant further contends that the district court committed plain error by failing to instruct the jury in precise words that they should give such weight to appellant's statement as they felt it deserved under all the circumstances, and further by failing to instruct the jury on the meaning of "voluntariness".

The district court delivered the following instruction regarding the voluntariness of appellant's statement (327-328):

It is for you to decide to what extent if at all defendant's interest has effected or colored her testimony might my, could be used against her in court that she was entitled to the assistance of counsel before making any statement, either oral or in writing, and that if she was without money

or means to retain counsel of her own choice, an attorney would be appointed to advise and represent her free of cost or obligation.

If the evidence in the case does not convince beyond a reasonable doubt that a statement was made voluntarily and intentionally you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that a statement was in fact voluntarily and intentionally made by the defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the statement.

By using the words "may consider" in its charge, the trial court avoided foisting a rigid "all or nothing" standard on the jury and plainly left to it the question of what weight, if any, it was to give to appellant's statements. To be sure, the *Barry* court did not imply that section 3501(a) was intended to delineate precise language to be used in charging the jury, but intended only that the question of the weight to be accorded such statements be left to the jury. Measured by that standard, Judge Pratt's voluntariness charge was unquestionably proper.

Moreover, there is no reason to infer, as appellant does, that the prosecutor's passing remarks in summation somehow led the jury to believe that the word "involuntary" was restricted to actual physical coercion, or, for that matter, that the word was used in other than its ordinary sense: connoting forcibly rather than freely. Indeed, given defense counsel's vigorous cross-examination of Inspector Klaus (140-167) and his extensive remarks in closing concerning the circumstances in which appellant's statements were given (282-290), it is difficult to conceive how the jury could have thought of the term in other than its ordinary sense. In this connection, it is

of particular interest that during its deliberation the jury requested that Inspector Klaus' testimony and appellant's testimony concerning Klaus' visit to her home be read back to them (340-342).

E. The Prosecuting Attorney Did Not Commit Plain Error In His Summation

Finally, appellant claims that the prosecuting attorney committed plain error when he made the following remark in his summation (249-250):

She [appellant] knew Frank [Indelicato], she took advantage of Frank in this situation as much as she was trying to take advantage of you in this case. A person that is kind to her, she went to him and got money never thinking of two minutes that she would get caught because her name was not on a check. If that is not the best evidence of a criminal mind, criminal intent, or common scheme and plan in this case, I don't think the United States Attorney can bring it to you for your consideration any better evidence.

In support of this contention appellant relies upon *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970).¹⁰ We submit that under the circumstances, the above remarks of the prosecutor constituted no more than harmless error. In *United States v. Grunberger, supra*, this Court did not declare the prosecutor's improper remarks to constitute plain error *per se*. Rather, the Court stated that "[e]ach case must be scrutinized on its particular facts to determine whether a trial error is harmless error

¹⁰ In *United States v. Grunberger, supra*, the Court found the following remark by the prosecutor to constitute error: "I don't know of a case where the evidence has been as strong as it has been in this case to establish the guilt of any defendant." 431 F.2d at 1068.

or prejudicial error when viewed in the light of the trial record as a whole, not whether each isolated incident viewed by itself constitutes reversible error". 431 F.2d at 1069.¹¹ Moreover, the salient feature of the prosecutor's remarks in *Grunberger* was the fact that he vouched for the quality of the evidence in its entirety. In the case at bar, the prosecuting attorney's remarks were addressed to what must be considered a rather insignificant fact in light of the panoply of incriminating evidence. Indeed, in almost all respects, appellant's testimony was contrary to that of Indelicato. Further, appellant admitted that she cashed the Flusberg and Hoffman checks for Chiarello, knowing at the time that they were stolen. We respectfully submit that when read as a whole, the prosecutor's summation did not exceed the bounds of fair comment. Given the foregoing considerations, the subject remarks must be considered as no more than harmless error.

POINT III

Appellant Was Properly Sentenced Under Title 18, United States Code, Section 3651

The district court sentenced appellant to a term of three years imprisonment to be served as a split sentence pursuant to 18 U.S.C. § 3651. The court ordered that appellant serve three months of that sentence in a jail type institution, that the remainder of the sentence be suspended and that appellant be placed on probation for

¹¹ It is noteworthy that in *United States v. Hysokion*, 439 F.2d 274 (2d Cir. 1971), the Second Circuit considered a claim that the prosecutor's summation exceeded the bounds of fair comment in light of the holding in *United States v. Grunberger*, *supra*. There the Court distinguished the prosecutor's remarks from those in *Grunberger*, *supra*, only after viewing the prosecutor's summation in its entirety. 439 F.2d at 277-279.

a term of four years to commence upon her release from confinement. Appellant now claims that her sentence was illegal because the maximum probation period imposable under 18 U.S.C. § 3651 may not exceed the length of that portion of the original sentence which has been suspended by the court. We submit that appellant's reading of the clear and unambiguous subject statute is incorrect and that appellant's sentence was proper.

Section 3651 of Title 18, United States Code, sets forth the statutory authority which governs the power of a district court to place a defendant on probation. The first paragraph of Section 3651 provides that upon entry of a judgment of conviction a court "may suspend the imposition or execution of sentence and place the defendant on probation *for such period and upon such terms and conditions* as the court deems best" (emphasis added). Indeed, there is no ambiguity here. A court is thus empowered, in its discretion, to suspend the execution or imposition of sentence. If it chooses this course, the court is required to set a definite period of probation. The terms and conditions of that probation are left to the court's discretion, except, as limited by the fifth paragraph of Section 3651, which provides that the period of probation and any extension thereof shall not exceed five years.

The second paragraph of Section 3651 authorizes the "split sentence".¹² Under this section a court may im-

¹² The so called split-sentence provision of 18 U.S.C. § 3651 provides as follows:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the

[Footnote continued on following page]

pose a sentence of which no more than six months may be served in confinement, suspend the remainder of the sentence, and set a term of probation "for such period and upon such terms and conditions as the court deems best." Appellant argues that the language of the second paragraph is ambiguous in that the term "for such period" might refer back to the preceding phrase "remainder of the sentence" or it might be an independent term qualified by the subsequent phrase "as the court deems best." The argument continues that if the phrase "for such period" refers back to the term "remainder of the sentence", then the court is without authority to impose a period of probation in excess of the remainder of the suspended portion of the sentence. This argument affronts the clear language of the statute.

It is a settled principle of statutory construction that "[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place." *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949). Here it must be noted that the term "for such period" in the first paragraph has no specific antecedent; hence, it is clear that the length of the probationary term authorized by the first paragraph is solely within the discretion of the court, except as circumscribed by the five year limitation set forth in paragraph five. Given the clear meaning of the term "for such period" in the first paragraph, there is no reason evident on the face of the statute why it should not have the same meaning in the second paragraph of the statute.

defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Moreover, the phrase "such terms and conditions" in the first and second paragraphs has no specific antecedents. It is therefore obvious that the terms "for such period" and "upon such terms and conditions" in the second paragraph are employed as parallel parts of the same phrase. There is no reason to bifurcate these parallel terms so that the former relates back while the latter stands independently. Just as two provisions in the same statute cannot be read inconsistently, surely, one half of a phrase cannot be read differently from the other half.

We therefore submit that the challenged statute is unambiguous and that the intent of Congress is clear on its face. It is apparent that the sole limitation placed upon the length of the probationary term is found in the fifth paragraph of the statute. The phrase "for such period" in the second paragraph indicates, when read together with the fourth paragraph, that up to a limit of five years, the court has unfettered discretion in fixing the length of the probationary term.¹³ Indeed, appellant's argument militates against the statute's clear purpose, namely, to provide the sentencing judge with broad discretion. Should appellant's restrictive reading of the statute be adopted, it would actually encourage the district courts to impose longer suspended sentences in order to maintain the same probationary periods imposed prior to the adoption of this restrictive reading. Based upon a plain reading of an unambiguous statute, appellant's argument must fail.

Appellant further contends that the language of the statute is so ambiguous that the correct interpretation

¹³ It has been consistently held that the period of probation may exceed the maximum period of imprisonment to which a defendant might have been sentenced. *See, e.g., Driver v. United States*, 232 F.2d 418, 421-422 (4th Cir. 1956); *Mitchem v. United States*, 193 F.2d 55, 57 (5th Cir. 1951).

cannot be gleaned from the face of the statute but rather must be sought in its legislative history. Appellant cites the legislative history of the second paragraph of section 3651 in support of her contention that the period of probation may not exceed the length of the suspended portion of a sentence. We submit that since the statute is clear and unambiguous, resort to legislative history is unjustified. *Holtzman v. Schlesinger* 484 F.2d 1307, 1314 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). Moreover, a reading of the legislative material cited by the appellant indicates that it does not support her position.

Prior to the 1958 amendment to section 3651 (which added the second paragraph), a court had no means of sentencing a defendant under a single count conviction to both a period of imprisonment and a period of probation; at that time such a dual sentence could only be imposed where there was a multi-count conviction. The 1958 amendment gave courts the power to sentence a defendant on a one count conviction to a term of imprisonment, of which a maximum period of six months could be served, to be followed by a required and definite period of probation. This combination became known as the "split sentence." See, *United States v. Sanjurjo*, 481 F.2d 638 (2d Cir. 1973); *United States v. Wertheimer*, 434 F.2d 1004, 1006 (2d Cir. 1970). The legislative history cited by appellant reveals little more than a concern by Congress over the inability of courts to sentence defendants to both a term of imprisonment and a term of probation on a single count conviction. Contrary to appellant's reading of the legislative history we submit that it does not support appellant's contention.

The hypothetical set forth after appellant's analysis of the legislative history misses the mark. There appellant claims that:

[t]hat to derive a three month jail sentence plus a four-year probation sentence from a three-year sen-

tence, however, is no longer a division of the three year sentence, since the component sentences exceed the actual sentence in length. They constitute not one, but two, sentences. It was legislative recognition of the fact that two sentences may not be imposed on a single indictment count that gave life to the special provision for splitting one sentence.¹⁴

It is submitted that when terms of imprisonment and probation are rendered pursuant to section 3651, it is not the original sentence imposed which is "split". Rather, the "split" sanctioned by paragraph two is that of the rigid vehicle for sentencing which existed prior to the 1958 amendment.

Finally, appellant's reliance on *United States v. Teresi*, 484 F.2d 894 (7th Cir. 1973) is misplaced. In *Teresi* the court found that a sentence of three years imprisonment with six months to be served, the remainder to be suspended, and two and one-half years probation was not void. The Court's finding that this particular sentence was acceptable does not imply that the *Teresi* court would have found a longer period of probation to be unacceptable. See, e.g., *Fagan v. United States*, 545 F.2d 1005, 1006 (5th Cir. 1977) in which the defendant was sentenced to eighteen months imprisonment, served three months, and subsequently remained on probation for five years pursuant to the split sentence provision of 18 U.S.C. § 3651. The Government does not argue that a court is *required* to impose probation for a period in excess of the suspended portion of the sentence, but that it *may* do so in its discretion. Thus, *Teresi* cannot be used in support of the proposition that the period of probation must be limited to the suspended portion of the sentence.

For the above stated reasons, we submit that appellant's sentence was proper under 18 U.S.C. § 3651 and should be upheld.

¹⁴ Appellant's Brief at 39-40.

CONCLUSION

The judgment of conviction should be affirmed

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

HARVEY M. STONE,
LAWRENCE J. ZWEIFACH,
*Assistant United States Attorneys,
(Of Counsel).*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

BARBARA ALLEN

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of January 19 78 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
LEGAL AID SOCIETY, 509 U.S. Courthouse, Foley Square, New York NY10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this
3rd day of January 19 78

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 19 79